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302 NLRB No. 79

D--1911
Chelsea, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DECORATIVE COVERINGS, INC.

and

Case 1--CA--27691

UNITED PAPERWORKERS
INTERNATIONAL UNION,
AFL--CIO, CLC AND ITS
LOCAL NO. 1918

April 11, 1991

DECISION AND ORDER

By Chairman Stephens and Members Cracraft and Oviatt

Upon a charge filed by United Paperworkers International Union, AFL--CIO, CLC and its Local No. 1918 (the Union) on October 9, 1990, and amended charges filed on October 12, 1990, and November 16, 1990, the General Counsel of the National Labor Relations Board issued a complaint on November 23, 1990, against Decorative Coverings, Inc. (the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent filed an answer to the complaint admitting in part and denying in part the allegations of the complaint.

On February 11, 1991, the General Counsel filed a Motion for Summary Judgment. On February 14, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent has not filed a response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated it authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint, the Respondent denied that it committed unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act. The Respondent did, however, admit other complaint allegations, including that it has failed to process the Union's grievances, and closed its Chelsea facility without prior notice to the Union and without having afforded the Union an opportunity to bargain with respect to the effects of such acts and conduct. The Respondent asserted that it ceased operation at its Chelsea facility in September 1990, and that its conduct was lawful pursuant to its filing a chapter 11 petition with the U.S. Bankruptcy Court. The Respondent's claim provides no defense to its admitted actions. Moreover, it is well established that the Board's jurisdiction and authority to hear and determine an unfair labor practice case to its final disposition are exempted from the automatic stay provisions of the Bankruptcy Act under the exception of 11 U.S.C. § 362(b)(4) and (5). See Katco, Inc. 295 NLRB No. 92, slip op. at 2 (June 30, 1989); American Fleet Maintenance Co., 289 NLRB 764 (1988).

Accordingly, we grant the General Counsel's Motion for Summary Judgment. On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, had been engaged in manufacturing wallpaper products at its facility in Chelsea, Massachusetts, from which it annually shipped products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section

2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Unit and the Union's Representative Status

The following employees of the Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of the Respondent except executives, clerical and office employees, watchmen working more than 50 percent of their time on such work, guards, bona fide supervisory employees engaged in supervisory work.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and has been recognized by the Respondent. The Respondent is a party to a collective-bargaining agreement with the Union which is effective from June 1, 1989, to May 31, 1992. By virtue of Section 9(a) of the Act, the Union is the exclusive representative of the unit employees for the purposes of collective bargaining, concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

B. The Violations

The collective-bargaining agreement described above provides, inter alia, for a grievance procedure. On August 21, 1990, and again on August 30, 1990, and continuing to date, the Respondent failed to process union grievances pursuant to the collective-bargaining agreement. Further, on August 30, 1990, the Respondent closed and ceased doing business at its Chelsea facility without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain with respect to the effects of such acts and conduct. Further, since August 1, 1990, the Respondent has repudiated its 1989--1992 collective-bargaining agreement with the Union. By these acts and

conduct, the Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Conclusions of Law

By failing and refusing to continue in full force and effect the terms and conditions of its collective-bargaining agreement with the Union by failing to process the Union's grievances, by closing its Chelsea facility without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain with respect to the effects of such acts and conduct, and by repudiating its 1989--1992 collective-bargaining agreement with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[1]

We shall order the Respondent to adhere to the terms and conditions of its current collective-bargaining agreement with the Union by making whole unit employees for any losses of wages and benefits [2] caused by the

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[1] In view of the Respondent's cessation of operations at the Chelsea facility, we shall provide for mailing the notice.

[2] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for the addition of a fixed rate of interest on unlawfully withheld fund payments at the adjudicatory stage of a proceeding. In the event the collective-bargaining agreement provides for fringe benefit fund payments, we leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy. Depending on the circumstances of each case, such additional amounts may be determined by reference to provisions in the documents governing the funds at issue and,
(Footnote continued)

Respondent's repudiation of the agreement in the manner prescribed in Ogle Protection Service, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

We shall also order the Respondent to process the Union's grievances that it unlawfully failed to process.

With respect to the Respondent's unlawful failure to bargain with the Union over the effects of the Respondent's termination of operations, the bargaining unit employees have been denied an opportunity to bargain through their collective-bargaining representatives at a time when the Respondent might still have been in need of their services, and at a time when a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practice committed.

Accordingly, we deem it necessary, in order to effectuate the purpose of the Act, to require the Respondent to bargain with the Union representing its employees, on request, about the effects of the closure on unit employees, and shall accompany the order with a backpay requirement designed both to make the employees whole for losses suffered as a result of the Respondent's failure to bargain, and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences

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where there are no governing provisions, by evidence of any losses directly attributable to the unlawful withholding, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs etc., but not collateral losses. Merryweather Optical Co., 240 NLRB 1213, 1216 fn.7 (1979). The Respondent shall also reimburse its empoloyees for any expenses ensuing from its failure, if any, to make contributions to the funds. Kraft Plumbing & Heating, 252 NLRB 891 fn.2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981).

for the Respondent. We shall do so in this case by requiring the Respondent to pay backpay to its employees in a manner similar to that required in Transmarine Navigation Corp., 170 NLRB 389 (1968). We shall order the Respondent to pay employees in the unit backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following events: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing on the unit; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of the date of this decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith. In no event shall the sum paid to any of the employees in the unit exceed the amount the employees would have earned as wages from the date on which the Respondent closed its operations to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have made a bona fide offer to bargain, whichever occurs sooner; provided, however, that in no event shall the sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Interest on all sums shall be computed in the manner prescribed in New Horizons, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Decorative Coverings, Inc., Hatfield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating its 1989--1992 collective-bargaining agreement with the Union.

(b) Refusing to meet and bargain with United Paperworkers International Union, AFL--CIO, CLC and its Local No. 1918 concerning the effects of the closing of its Chelsea facility.

(c) Refusing to process the Union's grievances.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Adhere to the terms and conditions of employment of its collective-bargaining ageement with the Union, and make whole unit employees for any losses resulting from the Respondent's repudiation of the 1989--1992 collective-bargaining agreement, plus interest in the manner set forth in the remedy section of this decision.

(b) On request, meet and bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning the effects of the closing of its Chelsea facility:

> All employees of the Respondent except executives, clerical and office employees, watchmen working more than 50 percent of their time on such work, guards, bona fide supervisory employees engaged in supervisory work.

(c) Pay the unit employees laid off or terminated on the date the Respondent terminated its operations their normal wages, plus interest for the period set forth in the remedy section of this decision.

(d) On request, process the Union's grievances pursuant to the collective-bargaining agreement.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other record necessary to analyze the amounts due under the terms of this Order.

(f) Mail a copy of the attached notice marked ''Appendix.''[3] To all employees who were employed by the Respondent immediately prior to the Respondent's cessation of operations. Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. April 11, 1991

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT repudiate our collective-bargaining agreement with the Union.

WE WILL NOT refuse to meet and bargain with United Paperworkers International Union, AFL--CIO, CLC and its Local No. 1918 concerning the effects of the closing of our Chelsea facility.

WE WILL NOT refuse to process the Union's grievances pursuant to our collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL adhere to the terms and conditions of our collective-bargaining agreement with Union, and WE WILL make whole unit employees for any losses resulting from our repudiation of the agreement, plus interest.

WE WILL, on request, meet and bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning the effects of the closing of our Chelsea facility:

> All our employees except executives, clerical and office employees, watchmen working more than 50 percent of their time on such work, guards, bona fide supervisory employees engaged in supervisory work.

WE WILL pay unit employees laid off or discharged on the date we terminated our operation their normal wages, plus interest, for a period required by the Decision and Order.

WE WILL, on request, process the Union's grievances pursuant to our collective-bargaining agreement.

DECORATIVE COVERINGS, INC.

(Employer)

Dated _____ By _____ _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10 Causeway Street, 6th Floor, Boston, Massachusetts 02222-1072, Telephone 617--565--6739.